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No. 98-131

In The

Supreme Court of the United States

October Term, 1998

UNITED STATES OF AMERICA,

Petitioner,

v.

SUN-DIAMOND GROWERS OF CALIFORNIA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Is the requirement in 18 U.S.C. § 201(c)(1)(A) that a thing of value be given "for or because of any official act" satisfied by a showing that the giving of a thing of value was motivated by the recipient's official position?

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus*, its members, or its counsel, has made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, *amicus* states that Petitioner and Respondent have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court.

membership of more than 10,000 attorneys and 28,000 affiliate members in all 50 States. The American Bar Association ("ABA") recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and to ensure that criminal statutes are properly construed and applied.

SUMMARY OF ARGUMENT

I. The federal gratuity statute makes it illegal to give a gift to a public official "for or because of any official act performed or to be performed by such public official." 18 U.S.C. § 201(c)(1)(A). By its plain terms, the statute requires that the gift be motivated by an "official act" – that is, in order to have committed a crime, the defendant must have acted with the specific intent to influence or reward some "official act." The statute simply does not reach gifts motivated merely by the recipient's "official position" or "status." The Independent Counsel's reading of the statute to the contrary is not only at odds with § 201(c)(1)(A)'s unmistakeable language, but also with its legislative history and this Court's prior decisions interpreting the statute.

II. Nor – as the Solicitor General contends – does § 201(c)(1)(A) reach gifts motivated merely by the recipient's "capacity" to perform official acts. The statute no more proscribes gifts motivated by a public official's "capacity" to exercise governmental power than it proscribes gifts motivated by a public official's "position" or "status." Although Congress used the expansive adjective "any" to modify "official act," the word "any" means *at least one*. Thus, in order to constitute a crime under § 201(c)(1)(A), the defendant must act with the specific intent to influence or reward at least one "official act" either already completed or to be performed in the future by the recipient. In order for this specific intent requirement to make any sense, the defendant must have had in mind, at the time he acted, the official act or acts "for or because of" which he gave the gift. It is not enough, as the Solicitor General contends, for the government to show that the defendant merely intended to create a "reservoir of goodwill" which might, at some unknown time in the future, redound to his benefit in some unidentified matter.

III. Finally, the interpretations of § 201(c) urged by both the Independent Counsel and the Solicitor General would render a virtual nullity the detailed and finely-nuanced rules and regulations which currently govern the acceptance of gifts by public officials. These rules – which have been adopted in appropriately differing forms by all three Branches – set forth comprehensive ethical standards controlling the conduct of federal officials. Section 201(c) should not be construed to sweep away these regulatory standards and impose instead a flat felony prohibition on gifts either motivated by the

recipient's "position" or given by a regulated entity to a regulator.

The judgment of the court of appeals should be affirmed.

ARGUMENT

I. SECTION 201(c)(1)(A) DOES NOT CRIMINALIZE GIFTS MOTIVATED BY THE RECIPIENT'S OFFICIAL POSITION.

A. Section 201(c)(1)(A)'s Plain Language Reaches Only Gifts Given For Or Because Of An Official Act.

1. "The task of resolving [a] dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself." *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). The federal gratuity statute provides, in pertinent part:

> Whoever . . . otherwise than as provided by law . . . gives, offers, or promises anything of value to any public official . . . *for or because of any official act performed or to be performed by such public official* . . . shall be fined under this title or imprisoned for not more than two years, or both.

18 U.S.C. § 201(c)(1)(A) (emphasis added). In this statute, Congress did not make it a crime simply to "give[ ], offer[ ], or promise[ ] anything of value to any public official," as it has proscribed in other contexts. Cf. 18 U.S.C. § 209(a) (prohibiting salary supplementation of public officials).

Instead, Congress required that there be a specific relationship – "for or because of" – between the defendant's giving the gratuity and something done or to be done by the official – "any official act performed or to be performed by such public official." In other words, Congress required that the gift must be given by the defendant with a particular, proscribed intent: to influence or at least reward, either retrospectively or prospectively, the performance of an official act.

Lest there be any doubt about what was being made criminal, Congress specifically defined the term "official act" as:

> any *decision or action* on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

Id. § 201(a)(3) (emphasis added). If these words are given their ordinary and common meanings, see *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 388 (1993), it is clear that § 201(c)(1)(A) does not make it a crime to give a thing of value to a public official merely because of the official's "position" or "status." The plain language of the statute makes it a crime to give a thing of value to a public official *only* when the thing of value is given "for or because" of a "decision or action" performed or to be performed by the public official. See *United States* v. *Brewster*, 506 F.2d 62, 82 (D.C. Cir. 1974); see also *United States v. Jennings*, 160 F.3d 1006, 1013 (4th Cir. 1998) ("An illegal gratuity . . . is a payment made to an official concerning a specific official act (or omission)

that the payor expected to occur in any event."); *United States* v. *Patel*, 32 F.3d 340, 344-45 (8th Cir. 1994) (same). As the First Circuit observed in construing a virtually identical state gratuity statute, "[t]he statute does *not* read 'for or because of the official's position.' Rather, it forbids gratuities motivated by 'any official act' and further defines, rather meticulously, 'official act.'" *United States* v. *Sawyer*, 85 F.3d 713, 735 (1st Cir. 1996). Indeed, although the definition of "official act" encompasses a broad array of official decisions and actions – including both past and future decisions and actions – an official's "position" is not under any reasonable stretch of the legal imagination a "decision or action" "performed or to be performed by such public official." See *infra* at 8-11. While gifts motivated by the recipient's official position may run afoul of the numerous ethics regulations governing gifts to public officials, see *infra* at 23-28, they simply are not crimes under § 201(c)(1)(A).

Had Congress wished to make gifts motivated by an official's "position" or "status" a crime, it could easily have done so. Compare 5 C.F.R. § 2635.202(a)(2) (prohibiting federal employees from accepting gifts "[g]iven because of the employee's official position"); 5 U.S.C. § 7353 (prohibiting federal officials from accepting gifts from persons who might be affected by the official's acts). In fact, in some circumstances, Congress has even chosen to make gifts to public officials illegal without regard to the motivation of the donor. For example, Congress has made it unlawful for federal meat inspectors to accept from persons engaged in commerce anything of value "given with any purpose or intent whatsoever." 21 U.S.C. § 622. Plainly, this is a very different offense from the

criminal gratuity provisions of § 201(c), which demand proof of "a *causal relationship* [of the gratuity] to specific [official] acts." *United States* v. *Seuss*, 474 F.2d 385, 389 (1st Cir. 1973) (emphasis added).

Indeed, Congress included in the same chapter of title 18 that contains § 201(c) two provisions making gratuities to public officials crimes without regard to the motivation of the donor. In 18 U.S.C. § 209(a), Congress prohibited "salary supplementation" of public officials without regard to the purpose for the payment. This Court has acknowledged the unusual breadth of § 209 as a "prophylactic rule[ ] . . . intended to prevent even the appearance of wrongdoing." *Crandon* v. *United States*, 494 U.S. 152, 164 (1990). Likewise, in 18 U.S.C. § 212, Congress made it a crime for a bank employee to give a bank examiner "any loan or gratuity," without regard to the purpose for which the gratuity is given. Unlike § 201(c)(1)(A), § 212 does not require any connection between the gratuity and performance or anticipated performance of any official act. Cf. *United States* v. *Bristol*, 473 F.2d 439, 443 (5th Cir. 1973) (18 U.S.C. § 213, prohibiting receipt of gratuity, requires only general intent to receive the gratuity).

The court of appeals thus correctly held, see Pet. App. at 5-11, and the Solicitor General concedes, see S.G. Br. at 13, 18, that § 201(c)(1)(A)'s plain language – which requires that a gift be given "for or because of any official act" in order to constitute a felony – does not reach gifts motivated merely by a public official's "position" or "status." On the contrary, by its plain terms, the statute makes criminal only those gifts motivated by an "official act" – that is, in order to have committed a crime, the

defendant must have acted with the specific intent to influence or reward some "official act."

2. Despite the clarity of the words enacted into law by Congress, the Independent Counsel attempts to rescue Respondent's conviction by contending that the words used in the district court's jury instructions – official "position" or "status" – are, at least where a regulated company is concerned, acceptable shorthand for "official act." See Pet. Br. at 18-26.[2] That contention must be rejected.

First, and most obviously, the statute does not use the words "position" or "status." It uses the phrase "official act," which in turn is defined as an official "decision or action." The word "position" (*i.e*, "office; post; employment; situation; job," *Webster's New Universal Unabridged Dictionary* 1405 (2d ed. 1983) (hereinafter *Webster's New Universal*)) is simply not a synonym of the words "decision" (*i.e.*, "the act of making up one's mind," *id.* at 471) or "action" (*i.e.*, "the doing of something," *id.* at 20). Indeed, they are no more synonymous than are "seat in Congress" and "vote on legislation" or "judge" and

[2] While the Solicitor General stops short of advocating such violence to the statutory language, he proposes an interpretation of the statute which is functionally indistinguishable: While § 201(c)(1)(A) reaches only gifts motivated by an "official act" – and not those motivated by the officials "position" or "status" – the government need not prove or even identify the "official act" "for or because of" which the gift was given. *See* S.G. Br. at 19-22. As demonstrated below, *see infra* at 18-23, this analysis is equally flawed.

"order."[3] Permitting a jury to convict a defendant of giving a gift to a public official "for or because of any official act" based upon a finding that the defendant gave the gift merely "for or because of" the official's "position" would thus permit conviction on proof of conduct which Congress has not made a crime, which is plainly impermissible. See *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (only Congress may prescribe federal crimes).

Second, the interpretation of § 201(c)(1)(A) advocated in the Independent Counsel's brief would require courts to draw an untenable and wholly arbitrary distinction between classes of individuals accused of giving illegal gratuities. In an attempt to disavow the insupportable position that *all* gifts motivated by the recipient's "position" are illegal, see S.G. Br. at 17-18, the Independent Counsel answers the Court's formulation of the question presented with a "qualified 'Yes.' " Pet. Br. at 17. According to the Independent Counsel, individuals accused of giving gifts to public officials with regulatory jurisdiction over them could be convicted upon proof that the gift was motivated by the recipient's "official position." Individuals charged with giving gifts to public officials who "ha[ve] not been, [are] not currently, and [are] not likely ever to be in a position to regulate" them, Pet. Br. at 18, in

[3] Further evidence that "official act" as it is used in § 201(c)(1)(A) does not mean "official position" is found in the correlative provision of the federal bribery statute, which prohibits corrupt gifts intended "to influence any official act." 18 U.S.C. § 201(b)(1)(A). Reading "official act" to mean "official position" would make § 201(b)(1)(A) nonsense, since one cannot corruptly influence an "official position."

contrast, could be convicted only upon proof that the gift was given for or because of an "official act." The statute, however, makes no such distinction between potential defendants. By its terms, it makes criminal only those gifts that are motivated by an "official act," regardless of the relationship between the donor and the recipient of the gift.[4]

Finally, although § 201(c)(1)(A) unambiguously reaches only gifts given "for or because of any official act" and *not* gifts motivated merely by a public official's "position" or "status," any doubt on this issue must be resolved in Respondent's favor. See *United States* v. *Bass*, 404 U.S. 336, 347 (1971). It is a bedrock principle of American jurisprudence that criminal statutes are construed *narrowly*, not broadly. See, *e.g.*, *Morning* v. *Family Publications Serv., Inc.*, 411 U.S. 356, 375 (1973); *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."). This canon of statutory construction is grounded both in deference to the prerogatives of Congress, to which is committed the sole power to define federal crimes, see *Dowling* v. *United States*, 473 U.S. 207, 213 (1985), and in a concern that "a fair warning should be given to the world in language that the common world

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[4] It is also unclear who would fall into the latter category of potential defendants since, in the Independent Counsel's view, "official act" means "official position" whenever the recipient "may at some unknown, unspecified later time, be in a position to act favorably to the giver's interests," Pet. Br. at 22, even when what the official might do to favor the donor is not "yet identifiable," *id.* at 19.

will understand, of what the law intends to do if a certain line is passed," *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931). Section 201(c)(1)(A) must accordingly be limited to gifts actually motivated by an "official act" either already completed or to be performed in the future by the recipient.

B. In Enacting Section 201(c)(1)(A), Congress Considered, But Did Not Adopt, Proposals To Make "Status" Gratuities Unlawful.

Section 201(c)(1)(A)'s legislative history confirms that it does not reach gifts motivated by the recipient's official "position." Congress passed the gratuity statute, 18 U.S.C. § 201(c), in 1962 as part of an effort to rationalize and consolidate the federal conflict-of-interest and bribery provisions that were then dispersed in nine separate sections throughout the United States Code. See Pub. L. No. 87-849, 76 Stat. 1119 (1962); S. Rep. No. 2213, 87th Cong., 2d Sess., *reprinted in* 1962 U.S.C.C.A.N. 3852, 3853 ("S. Rep. No. 2213"); Staff of the House Comm. on the Judiciary, 85th Cong., 2d Sess., *Federal Conflict of Interest Legislation* 65 (1958) ("House Staff Report"). All nine sections prohibited attempts to influence specified officials in the performance of an official act, but five also prohibited gratuities – *i.e.*, things of value given for an official act, but without proof of a *quid pro quo*. *House Staff Report* at 67.

In its 1958 report, the House Judiciary Committee Staff recommended that a "new section should . . . uniformly prohibit all payments and receipts 'for' official action" for all federal officials. *Id.* at 72. As the Staff

explained, "a practice of tacitly 'rewarding' public officials *for their official acts* could undermine the public service as effectively as if the payments were the fruit of express corrupt agreement." *Id.* (emphasis added). Consonant with the eventual language of § 201(c) as interpreted by the court of appeals, the report recommended making illegal "the payment or receipt of anything of value *in appreciation of, or as a reward for an official act. . . .* " *Id.* (emphasis added). The Staff indicated that the difficult issue was whether the criminal law should extend beyond transactions where a bribe was given as a *quid pro quo* for official action:

> While it may at first blush seem harsh to impose a severe penalty for making or receiving a gift for which no corrupt consideration has been given, it is readily apparent that a practice of tacitly "rewarding" public officials for their official acts could undermine the public service as effectively as if the payments were the fruit of express corrupt agreement. . . . It is accordingly recommended that payments to and receipts by public officials *for their official acts* be prohibited as bribery.

Id. (emphasis added). The Committee Staff did not recommend that the gratuity statute be extended beyond gratuities made "for or because of" an official act. The Staff specifically noted that another bill, S. 3306, which had been introduced in 1958, "goes further, and would outlaw gifts to Government officials by interested parties, irrespective of purpose or intent." *Id.* at 72 n.33.[5]

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[5] In introducing S. 3306, Senator Proxmire stated: "I introduce . . . a bill to prohibit the making of gifts to officials of Government agencies by persons having business with such agencies, and to prohibit the acceptance of such gifts." 104 Cong. Rec. 2353 (1958). After it was introduced, S. 3306 was referred to the Committee on the Judiciary. *See* 104 Cong. Rec. 2352, 2354. No further action was ever taken on the bill.

In line with the staff's recommendations, the chairman and ranking minority member of the House Judiciary Committee introduced identical bills (H.R. 3411 and 3412) containing uniform prohibitions against paying gratuities to federal officials for or because of their official acts. See S. Rep. No. 2213, at 3853; H.R. Rep. No. 748, 87th Cong., 1st Sess. 7 (1961); *Federal Conflict of Interest Legislation: Hearings on H.R. 302, H.R. 3050, H.R. 3411, H.R. 3412, and H.R. 7139 Before the Antitrust Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. (1961) (hereinafter *House Conflict of Interest Hearings*). Those prohibitions, with changes not relevant here, survived in the bill (H.R. 8140) that Congress passed in 1962, see H.R. Rep. No. 748, at 15-16, and were codified as § 201(c).

In the course of developing H.R. 8140, the House Judiciary Committee considered another bill, H.R. 3050, that involved reform of the conflict-of-interest laws, but did not address the existing bribery and gratuity laws, including the provisions for illegal gratuities paid for official acts. Cf. S. Rep. No. 2213, at 3853; H.R. Rep. No. 748, at 8. Among the reforms that H.R. 3050 proposed was a prohibition on certain gifts to federal government employees:

> GIFTS. – No person shall give, transfer, or deliver, directly or indirectly, to a Government

employee any thing of economic value as a gift, gratuity, or favor if either –

> (1) such person would not give the gift, gratuity, or favor *but for such employee's office or position within the Government*; or
>
> (2) such person [has contractual relations with the employee's agency, is regulated by that agency, or has interests that might be substantially affected by the employee's performance or nonperformance of official duty].

H.R. 3050, Title I, § 9(b) (1961), *reprinted in House Conflict of Interest Hearings* 11 (emphasis added). This prohibition on gifts – which bears a striking similarity to how the Independent Counsel would construe § 201(c)(1)(A) – was intended to be enforced primarily by agency administrative measures authorized in §§ 10-12 of the bill, see *id.* at 11-14, 110 (statement of Rep. Lindsay), although the bill would also have authorized criminal prosecutions for knowing or purposeful violations of its provisions, see *id.* at 14.

The prohibition in H.R. 3050 on gifts given because of an "employee's office or position within the Government" was not included in H.R. 8140 and was never enacted into law. Roswell Perkins, who chaired the New York City Bar Association subcommittee that drafted H.R. 3050, testified before the Senate Judiciary Committee that *only* "gifts with a provable attempt to influence an official act are squarely covered by the bribery sections [of H.R. 8140]. That much we can concede." *Conflicts of Interest: Hearings Before the Senate Judiciary Comm.*, 87th Cong., 2d

Sess. 43 (1962) (hereinafter *Senate Conflict of Interest Hearings*).

In an attempt to restore the prohibition on gifts motivated by the recipient's official "position," Senator Keating offered an amendment to H.R. 8140 that would have banned gifts to federal employees "if the employee ha[d] reason to believe the donor would not give the gift but for the employee's position." *Id.* at 10, 15. Senator Keating explained that, with his amendment, "the bill would bar gifts to Federal employees from donors having business relations with the employee's agency or where the donor conducts operations regulated by the employee's agency. Such obvious attempts at influence peddling or the purchasing of goodwill should be strictly prohibited." *Id.* at 10. Notably, Senator Keating's amendment would have imposed only civil administrative – not criminal – penalties for violations. See 108 Cong. Rec. 11,258 (1962); *Senate Conflict of Interest Hearings* at 25. In response, the Department of Justice submitted testimony that the Keating amendment was unnecessary in light of the existing agency regulations and executive orders that already prohibited the acceptance of "status" gifts by government employees. *Id.* H.R. 8140 was subsequently enacted into law without the Keating amendment.

The legislative history thus refutes the Independent Counsel's claim that § 201(c) prohibits gifts motivated by the recipient's official "position."[6] Gifts of that kind – so-

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[6] The Independent Counsel argues that this history should be ignored because Senator Keating chose not to introduce his amendments in the Senate. *See* Pet. Br. at 37. While it is true the Keating amendments were not debated, Senator Keating's

called "status" gratuities – were considered by Congress to be *ethical* matters best handled by administrative regulation or executive order, not the criminal laws. After receiving testimony that the existing ethical regulations made such a statutory prohibition superfluous, both the House and Senate Judiciary Committees rejected those bills or amendments. The expansive reach ascribed to the *criminal* gratuity provisions of § 201(c) by the Independent Counsel was contemplated by Congress and was rejected.

C. This Court's Precedents Have Not Suggested That Section 201(c)(1)(A) Prohibits Anything Other Than Gifts Motivated By An Official Act.

This Court's prior decisions interpreting § 201(c) and its predecessor, 18 U.S.C. § 201(f), provide no support for the Independent Counsel's argument that § 201(c)(1)(A)'s requirement that the gift be given "for or because of any official act" is satisfied by a showing that the gift was motivated by the recipient's "official position." In *United States* v. *Brewster*, 408 U.S. 501 (1972), the Court clearly

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decision not to introduce his amendments for fear of jeopardizing passage of the bill, *see* 108 Cong. Rec. 21,987 (1962) ("We have been advised that any *substantial* amendments would create great, if not insuperable, obstacles to the passage of the bill in the other body." (emphasis added)), shows that expanding the anti-gratuity provisions to reach gifts motivated by the recipient's "official position" was understood as a substantial extension of the language eventually enacted as § 201(c).

stated that to sustain a conviction under § 201(c)'s predecessor, "it is necessary to show that [the defendant] solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for *an* official act." *Id.* at 527 (emphasis added). The language on which the Independent Counsel places undue reliance, see Pet. Br. at 27, is not to the contrary, but merely reiterates the Court's conclusion that "the Government need not show any act of [the defendant] subsequent to the corrupt promise for payment," because "it is *taking* the bribe, not performance of the illicit compact, that is a criminal act." 408 U.S. at 526.

The Independent Counsel's reliance on *Standefer* v. *United States*, 447 U.S. 10 (1980), is similarly misplaced. In *Standefer*, the Court dismissed Petitioner's challenge to the "instructions to the jury on criminal intent," by announcing in a footnote that it "agree[d] with the Court of Appeals that the instructions were correct." *Id.* at 14 n.8. However, the jury instructions affirmed by this Court very clearly required the jury to find that the gifts at issue were motivated by an "official act," not by the recipient's "official position." In its jury instructions, the district court carefully described the intent required for a gift to violate the gratuity statute, explaining that "it is not necessary that [the jury] find the defendant gave such things of value with the intent of influencing an Internal Revenue Agent in performing *his audit or audits of Gulf Oil Corporation's returns.*" Appendix, *Standefer* v. *United States*, No. 79-383, Tr. at 16 (emphasis added).[7] The

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[7] The district court's instructions in *Standefer* were reprinted in the Appendix filed with this Court and are available through LEXIS. *See* Pet. Br. at 28 n.9.

court continued, "[i]t is sufficient if the defendant made these payments because of a desire to create a better atmosphere with [the IRS agent] with respect to *the performance of the audit*." *Id.* (emphasis added). Thus, the instructions which this Court affirmed – without explanation – did not dispense with § 201(c)(1)(A)'s requirement that the gift be motivated by a specific "official act" or relieve the government of the burden of identifying that act.

II. SECTION 201(c)(1)(A) CRIMINALIZES ONLY GIFTS MOTIVATED BY A SPECIFICALLY IDENTIFIED OFFICIAL ACT.

Both the court of appeals and this Court framed the issue presented by this case narrowly as whether a gift motivated by the recipient's official position is given "for or because of any official act" within the meaning of § 201(c)(1)(A). Although he disclaims the Independent Counsel's "status" gratuity theory, the Solicitor General advances a far broader theory of criminal liability under the gratuity statute. Indeed, the Solicitor General would interpret § 201(c)(1)(A) to relieve the government entirely of the burden of proving the specific relationship between the defendant's giving the gratuity and something done or to be done by the official that Congress required in order for a gift to a public official to be a crime.[8]

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[8] The issue raised by the Solicitor General's broader argument is not fairly included in the question on which this Court granted *certiorari* and was not addressed by the court of appeals. This Court accordingly may decline to address the issue. *See, e.g., Roberts* v. *Galen of Virginia, Inc.*, No. 97-53, slip op. at 5 (Jan. 13, 1999); *Blessing* v. *Freestone*, 520 U.S. 329, 340 n.3 (1997); Sup. Ct. R. 14.1(a).

Although he concedes that the gratuity statute does not reach gifts motivated by the recipient's "official position," the Solicitor General contends that "where a gift to a public official is motivated by the recipient's *capacity* to exercise governmental power or influence in a manner favorable or unfavorable to the donor, the gift is proscribed by Section 201(c)(1)(A), regardless of whether the gratuity is linked to any specific official act." S.G. Br. at 12 (emphasis added). Further, the government need not even identify the official act "for or because of" which the gift was allegedly given. *Id.* at 18. Instead, "where a thing of value is given to a government official who has authority to act in matters affecting the donor's interests, the jury should generally be permitted to infer, *based on that relationship alone*, that the gift" violated § 201(c)(1)(A). *Id.* at 24 (emphasis added). In the Solicitor General's view, a defendant could be convicted of giving a thing of value to a public official "for or because of any official act performed or to be performed" based solely on proof that he gave a gift to a public official whose actions might someday affect his interests, even though the "official act" motivating the gift is not (or cannot) be identified.[9]

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[9] The Independent Counsel presents a much more blunt, though functionally indistinguishable, formulation of the Solicitor General's argument: "The donor's conduct in giving gifts to the very official who regulates the donor is, *by the statute's own definition*, 'for or because of any official act performed or to be performed.' " Pet. Br. at 25 (emphasis added). *See also id.* at 23 ("[T]he statute effectively reaches anything of value given because an official is in a 'position' to take action affecting the donor. . . . ").

The Solicitor General's argument proceeds from a fundamentally flawed premise. The statute no more proscribes gifts motivated by a public official's "capacity to exercise governmental power" than it proscribes gifts motivated by a public official's "position" or "status." See *supra* at 4-11. The statute prohibits *only* gifts given "for or because of any official act performed or to be performed." Although this Court has read the word "any" expansively, see, *e.g.*, *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning. . . . "), it consistently has construed "any" to mean *at least one*, see, *e.g.*, *Salinas* v. *United States*, 118 S.Ct. 469, 473 (1997). See also *Webster's II New Riverside University Dictionary* 115 (1984) (defining "any" as "One or some, regardless of sort, quantity, or number"); *Webster's New Universal* at 83. Thus, Congress required that, in order to constitute a crime, the gift be motivated by "one or some" "official act" either already completed or to be performed in the future by the recipient. In order for the statute's specific intent requirement to make any sense, the defendant must have had in mind, at the time he acted, the official act or acts "for or because of" which he gave the gift. It is not enough, as both the Independent Counsel, see Pet. Br. at 19, 22 and the Solicitor General, see S.G. Br. at 12, 20, contend, for the defendant merely to have intended to create a "reservoir of goodwill" which might, at some unknown time in the future, redound to his benefit in some as-yet unknown matter. See *United States* v. *Jennings*, 160 F.3d 1006, 1020 n.5 (4th Cir. 1998) ("[G]oodwill gifts" – "given with no more than some generalized hope or expectation of ultimate benefit" – "are neither bribes nor gratuities." (internal quotation

marks and citations omitted)); *United States* v. *Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980). Under the statute's plain language, in order to be guilty of a crime – as distinguished from causing a violation of one of the numerous ethical regulations governing gifts to public officials – the defendant must act with the specific intent to influence or at least reward "one or some" "official act." See *supra* at 4-11.[10]

The Solicitor General's theory would dispense with § 201(c)(1)(A)'s specific intent requirement by relieving the government of the burden of even identifying an "official act" allegedly motivating the gift. Instead, the Solicitor General would require the government to show nothing more than that the defendant gave a gift to a public official who had the authority to act in matters affecting the defendant's interests. See S.G. Br. at 24. In particular, this theory would *not* require the government to show that the defendant knew or foresaw that any identifiable matter affecting his interests was either pending or would come before the recipient official. If accepted, this theory would vastly extend the reach of the federal gratuity statute. Indeed, under this theory, a jury could convict the following individuals of having given

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[10] In any event, as the Solicitor General's failure to offer any textual support for his reading of § 201(c)(1)(A) suggests, *see* S.G. Br. at 15-19, construing "any official act" to mean "capacity to exercise governmental power" is – if not erroneous – hardly compelled by the language of the statute. Under the rule of lenity, the criminal prohibition of § 201(c)(1)(A) must accordingly be limited to gifts actually motivated by an "official act" either already completed or to be performed in the future by the recipient. *See supra* at 10-11.

an illegal gratuity, and its guilty verdict could not be set aside by any court, see *id.*:

- A lawyer who treats an old friend who has been appointed to the court of appeals to a baseball game. See Pet. App. at 10 & n.4.
- Elementary school students who give the visiting Secretary of Education a jacket emblazoned with their school colors.
- An admiring senior citizen who sends a hand-knitted sweater or a box of brownies to her Senator, who sits on the Senate Finance Committee's Subcommittee on Social Security and Family Policy.

Under the Solicitor General's theory, in each of these cases, "a thing of value is given to a government official who has authority to act in matters affecting the donor's interests, [and] the jury . . . *based on that relationship alone*," S.G. Br. at 24, is entitled to convict. Proof of facts from which a jury could infer that the gift was motivated by "one or some" "official act" – *e.g.*, proof that the lawyer in the first hypothetical actually had or anticipated bringing a case before the court of appeals – would not be required.

Whether the government must prove – circumstantially or otherwise – that a gift was given "for or because of" an identified "official act" or may take the easier routes of proving that it (i) was motivated by the recipient's official "position" or (ii) was merely given to an official who had authority to act on matters affecting the donor's interests is *not* a matter of legal "hair-splitting," Pet. Br. at 41. On the contrary, the question presented by this case is one with enormous legal – and practical –

consequences. The "status" gratuity theory advocated by the Independent Counsel operates to relieve the government of the burden of proving beyond a reasonable doubt that the defendant acted with the statutorily-specified corrupt intent – *i.e.*, "for or because of any official act." The broader theory advocated by the Solicitor General would effectively relieve the government of proving that the defendant acted with any intent at all. Instead, the government need only show that the defendant *might* have had some interest in some matter that *might* come before the official at some time in the future, and then rely on a presumption that where the proscribed intent *might* logically have existed, it actually did. At bottom, both the Independent Counsel's and the Solicitor General's theories attempt to substitute a different intent requirement for that adopted by Congress. If accepted, these theories would dramatically broaden the parameters of the gratuity statute and criminalize far more conduct than the language of the statute actually encompasses. Accordingly, they should both be rejected.

III. GIFTS MOTIVATED BY A PUBLIC OFFICIAL'S POSITION OR CAPACITY TO PERFORM OFFICIAL ACTS ARE PROHIBITED UNDER EXISTING RULES AND REGULATIONS.

The interpretations of § 201(c) urged by the Independent Counsel and the Solicitor General would virtually nullify the detailed rules and regulations which currently govern the acceptance of gifts by public officials. Indeed, if their arguments were to be accepted, § 201(c) would entirely supplant the comprehensive and finely-tuned

ethical standards that already control the conduct of federal officials and impose instead a flat felony prohibition on gifts either motivated by the recipient's "position" or given by a regulated entity to a regulator.

1. The Office of Government Ethics ("OGE") has prescribed detailed regulations governing the circumstances under which Executive-Branch employees may accept gifts. Unlike § 201(c), these regulations expressly prohibit both gifts motivated by the recipient's "official position" and gifts to a public official from a "prohibited source." For example:

> Except as provided in this subpart, an employee shall not, directly or indirectly, solicit or accept a gift:
>
> (1) From a prohibited source; or
>
> (2) Given because of the employee's official position.

5 C.F.R. § 2635.202(a). See also *id.* § 2635.203(d) (defining "prohibited source" as, *inter alia*, a donor "ha[ving] interests that may be substantially affected by performance or nonperformance of the employee's official duties" or are otherwise directly regulated by that employee); *id.* § 2635.203(e) (defining when a gift is given "because of the employee's official position"). This regulatory scheme carefully explains that a gift is given because of the recipient's "official position" when it "would not have been solicited, offered, or given had the employee not held his position as a Federal employee," *id.* § 2635.203(e), a definition virtually identical to that offered by the Independent Counsel.

Unlike § 201(c)(1)(A), however, the OGE regulations go on to delineate specific categories of exceptions to this general prohibition which carefully balance the broad goal of maintaining the integrity of the Federal Government against the realities of holding public office. See 5 C.F.R. § 2635.204. For example, the regulations exclude the following: gifts worth $20 or less, *id.* § 2635.204(a); gifts based upon personal relationships, *id.* § 2635.204(b); and gifts of food and refreshments provided at speaking engagements, *id.* § 2635.204(g)(1), (g)(4); as well as nine other specifically defined categories of gifts, see *id.* § 2635.204(c)-(*l*). In recognition of the special responsibilities of their offices, the OGE regulations even provide an exemption for the President and Vice-President against the general ban on gifts motivated by the recipient's "official position" or given by a "prohibited source," see *id.* § 2635.204(j), thus excepting them from administrative sanction for accepting, for example, a donation of a Thanksgiving turkey, even when matters of farm policy are pending before them. The Independent Counsel's and the Solicitor General's interpretations of § 201(c)(1)(A) would render this carefully calibrated regulatory scheme – which is enforced through a variety of administrative and disciplinary remedies, see 5 C.F.R. §§ 2635.106, 2638.501 – a functional nullity, replacing it with a flat felony prohibition without even a *de minimis* exception.[11]

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[11] In 1997, the Independent Counsel brought an indictment against one individual under the anti-gratuity provision of the Federal Meat Inspection Act, 21 U.S.C. § 622, for, *inter alia*, giving a $13 basketball ticket to a public official. *See United States* v. *Williams*, Cr. No. 96-314 (JR) (D.D.C.) (Sept. 30, 1997) (superseding indictment).

The OGE's regulations also clearly indicate that they were understood to reach far further than the criminal prohibitions of § 201(c). The regulations specifically state:

> (b) *Relationship to illegal gratuities statute.*
>
> Unless accepted in violation of paragraph (c)(1) of this section [prohibiting the "accept[ance of] a gift in return for being influenced in the performance of an official act"], a gift accepted under the standards set forth in this subpart shall not constitute an illegal gratuity otherwise prohibited by 18 U.S.C. 201(c)(1)(B).

5 C.F.R. § 2635.202(b).[12] The clear implication of this section is that the gratuity statute was not understood by the OGE to place an automatic blanket prohibition on all gifts given because of the recipient's "position" or given by a "prohibited source."

2. The United States Congress has adopted similarly detailed, and suitably customized, ethical rules governing the acceptance of gifts by its members, officers, and employees. See H.R. Rule LII(1)(a) ("No Member, officer,

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[12] The Office of Government Ethics specifically explained:

> "Section 2635.202(b), as drafted, explains the relationship between the standards set forth in proposed subpart B and 18 U.S.C. 201(c)(1)(B). . . . [T]he language of § 2635.202(b) reflects congressional intent that the acceptance of a gift in accordance with the exceptions and other standards set forth in subpart B will not subject an employee to prosecution for violation of the illegal gratuities statute."

Standards of Ethical Conduct for Employees of the Executive Branch, 56 Fed. Reg. 33780 (1991).

or employee of the House of Representatives shall knowingly accept a gift except as provided in this rule."); S. Rule XXXV(1)(a)(1) ("No Member, officer, or employee of the Senate shall knowingly accept a gift except as provided in this rule."). Like the OGE regulations, these rules have a clear *de minimis* exception, expressly permitting the acceptance of gifts worth less than $50. See H.R. Res. 9, 106th Cong., 1st Sess. (1999) (enacted); S. Rule XXXV(1)(a)(2). Like the OGE regulations, the House and Senate gift rules also contain a wide variety of finely-crafted exceptions which take into account, *inter alia*, the necessary interaction between members of the public and their elected representatives. See H.R. Rule LII(1)(c); S. Rule XXXV(1)(c).

3. The Federal Judiciary is also subject to stringent rules governing the acceptance of gifts. The Code of Conduct for United States Judges stresses the importance of the integrity and independence of the federal judiciary, and instructs judges to "regulate extra-judicial activities to minimize the risk of conflict with judicial duties." Code of Conduct for United States Judges, Canon 5. The Code of Conduct further instructs judges and members of their families not to accept *any* gift unless it falls in one of eight specified categories. See *id.* at Canon 5C(4). One of those categories, however, specifically permits a judge to accept certain gifts that are obviously motivated by the judge's "position." For example, judges may freely accept "gift[s] incident to a public testimonial"; gifts of "books, tapes and other resource materials supplied by publishers on a complimentary basis for official use"; and "invitation[s] to . . . bar-related function[s] or . . . activit[ies] devoted to the improvement of the law, the legal system,

or the administration of justice." *Id.* at Canon 5C(4)(a). Moreover, unlike § 201(c) as interpreted by the Solicitor General, the Code of Conduct permits judges – who have the *authority* to act in matters affecting almost everyone's interests – to accept gifts so long as the donor "is not a party or other person who *has* come or is *likely* to come before the judge or whose interests may be substantially affected by the performance or non-performance of his or her official duties." *Id.* at Canon 5C(4)(h)(ii) (emphasis added).

The interpretations of § 201(c)(1)(A) urged by the Independent Counsel and the Solicitor General would sweep aside these finely-nuanced rules and regulations and subject not just public officials, lobbyists, and regulated entities, but also ordinary citizens who come into contact with public officials, to severe criminal sanctions for ordinary acts that Congress determined were best combated through non-criminal remedies. See *supra* at 10-14. Under the Independent Counsel's and Solicitor General's theories, it would be a felony for any appreciative constituent to give anything to a Member of Congress or the President – before whom everyone always has some matter of interest. Their interpretations of § 201(c) accordingly would not only upset the carefully tailored balance struck by the existing gift rules, but also threaten to trivialize the criminal law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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